

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	WC Docket No. 11-42
Lifeline and Link Up Reform and)	
Modernization)	
)	
Telecommunications Carriers)	WC Docket No. 09-197
Eligible for Universal Service)	
Support)	
)	
Connect America Fund)	WC Docket No. 10-90

LIFELINE CONNECTS COALITION PETITION FOR WAIVER

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SUMMARY

As the Lifeline Connects Coalition members (Petitioners) seek to implement the reforms adopted by the Federal Communications Commission (Commission) in its 2016 Lifeline Modernization Order,¹ issues and concerns are arising as to how to implement the revised non-usage provisions without harming consumers and in a manner consistent with Commission rules. The revised non-usage rules, 47 C.F.R. § 54.405(e)(3) and 47 C.F.R. § 54.407(c)(2), shorten the 60-day non-usage window to 30 days and the 30-day cure period to 15 days, and become effective on December 2, 2016.

Recently, TracFone filed a Petition for Reconsideration² and a Motion to Stay³ the 30-day non-usage rule, asking the Commission to either waive or delay the effective date. Then, the Universal Service Administrative Company (USAC) released guidance on October 5, 2016 (USAC Guidance) indicating that the revised 30-day non-usage window would apply to Lifeline subscribers with non-usage periods beginning *before* December 2,⁴ even though the revised rule does not become effective until December 2. At the same time, questions and concerns are emerging as to which reimbursement rule eligible telecommunications carriers (ETCs) should follow given conflicts in the revised sections 54.407(a) and 54.407(c)(2) of the Commission's

¹ See *Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund*, WC Docket Nos. 11-42, 09-197, 10-90, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38 (rel. Apr. 27, 2016).

² See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., TracFone Petition for Reconsideration (filed June 23, 2016).

³ See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Motion for Stay or, in the Alternative, Deferral of the Effective Date of Revised 47 C.F.R. § 54.407(c)(2) (filed Sept. 8, 2016).

⁴ See "Update to the Non-Usage Rules," LI Program News, 3rd Quarter 2016, USAC (Oct. 5, 2016).

rules. In light of the significant threat of consumer harm and endangerment, and confusion and conflicts posed by implementation of the revised rules, Petitioners request the following relief from the Wireline Competition Bureau (Bureau).

First, the Bureau should waive rules 54.405(e)(3) and 54.407(c)(2), each of which replaces the 60-day non-usage period with 30 days, because the new 30-day non-usage rules will harm and endanger consumers. Absent a waiver of these rules, many eligible low-income consumers face the significant likelihood that they will through no action of their own be denied Lifeline benefits to which they are entitled and for which they have expressed no desire to discontinue. The record indicates that millions of Lifeline subscribers may lose access to vital communications services when the new 30-day non-usage rules takes effect. While most of these subscribers are expected to re-enroll in Lifeline, the harm and endangerment that results from having essential communications services cut-off in the interim should not be ignored or discounted. Family, healthcare providers and schools will no longer be reachable until the consumer goes through the burdensome task of re-enrolling in Lifeline, which requires a fresh eligibility determination and a fresh set of subscriber self-certifications, imposing significant burdens and costs on ETCs and on the Lifeline program administrator.

Second, the Bureau should direct USAC to rescind its guidance that would implement the 30-day non-usage rule prior to the December 2, 2016 effective date, which is unlawful and impractical for ETCs to administer. Absent a transition rule, which does not exist, some ETCs will mistakenly think they are required to adhere to USAC's guidance and scramble to notify Lifeline subscribers who are in a non-usage period that began before December 2 that they have a much shorter time than they reasonably would have expected to use the service or risk de-enrollment from the Lifeline program.

Third, the Bureau should waive rule section 54.407(c)(2) because it is in direct conflict with section 407(a) of the Commission's rules. Rule 54.407(a) establishes that Lifeline service providers will be reimbursed on the first of the month based on the total number of subscribers enrolled in Lifeline that they serve, while rule 54.407(c)(2) bars reimbursement for Lifeline service provided to subscribers enrolled in Lifeline who are in a non-usage cure period. This conflict places ETCs in an untenable position. Rules that do not provide for equitable and efficient program administration result in harm not only to ETCs but to consumers and to the program itself.

Petitioners request that the Bureau grant a time-limited waiver of rule sections 54.405(e)(3) and 54.407(c)(2) until such time as the Commission rules on the TracFone Petition for Reconsideration, and direct USAC to rescind its guidance expediting the December 2 effective date for the revised non-usage rules. Granting this request is in the public interest and will protect consumers from unnecessary harm and endangerment, correct unlawful and impractical USAC guidance, and prevent the inconsistent application of the Commission's rules.

TABLE OF CONTENTS

	Page
SUMMARY	I
LIFELINE CONNECTS COALITION PETITION FOR WAIVER	1
I. BACKGROUND	6
A. 47 C.F.R. § 54.405(e)(3)	6
B. 47 C.F.R. § 54.407(c)(2)	7
C. 47 C.F.R. § 54.407(a)	8
D. USAC Guidance	9
II. REQUEST FOR WAIVER	10
A. The Bureau Should Waive Sections 54.405(e)(3) and 54.407(c)(2) because the Revised 30-Day Non-Usage Rules Will Harm and Endanger Consumers	10
B. The Bureau Should Correct the USAC Guidance and Make Clear that Consumers Get a Fresh Start with 30 Days to Demonstrate Usage as of December 2	14
1. The USAC Guidance Erroneously Suggests Implementation of the New Non-Usage Rules Prior to their Lawful Effective Date	15
2. ETCs Cannot Practically Implement the New Non-Usage Rule Prior to the Effective Date	16
C. The Bureau Should Waive Section 54.407(c)(2) which Conflicts with the Reimbursement Directive in Section 54.407(a)	18
III. GOOD CAUSE EXISTS TO GRANT THE REQUESTED WAIVER	20
IV. CONCLUSION	24

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LIFELINE CONNECTS COALITION PETITION FOR WAIVER

As eligible telecommunications carriers (ETCs), including members of the Lifeline Connections Coalition (Petitioners),⁵ work diligently to implement the rule changes adopted by the Federal Communications Commission (Commission) in the 2016 Lifeline Modernization Order,⁶ significant questions remain unaddressed and continue to emerge regarding the revised non-usage rules, including 47 C.F.R. § 54.405(e)(3), which decreases the current non-usage period of 60 days to 30 days and the current cure period of 30 days to 15 days. The Commission also has revised 47 C.F.R. § 54.407(c)(2) to reflect the shortened non-usage and cure periods.

A compelling body of evidence and law weighs in favor of the Wireline Competition Bureau (Bureau) granting on delegated authority⁷ a limited-time waiver of these rule changes,

⁵ Petitioners are Telrite Corporation, i-wireless LLC, Blue Jay Wireless, LLC and American Broadband & Telecommunications Company (collectively, the Lifeline Connects Coalition).

⁶ *See Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund*, WC Docket Nos. 11-42, 09-197, 10-90, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38 (rel. Apr. 27, 2016) (2016 Lifeline Modernization Order).

⁷ *See* 47 C.F.R. § 0.91(b) (authorizing the Bureau to "[a]ct on requests for interpretation or waiver of rules"); *see also* 47 C.F.R. § 0.291(a) (stating that the Bureau has delegated authority

which have limited application to subscribers who elect prepaid wireless Lifeline services and the ETCs who serve them, until such time as important matters of law can be settled.

In the 2016 Lifeline Modernization Order, the Commission shortened the non-usage period from 60 days to 30 days and the cure period from 30 days to 15 days based on its revision of the definition of usage to include the sending of text messages and data.⁸ The Commission concluded that expanding the definition of usage to include outbound text messages would greatly ease consumers' ability to show their desire to retain Lifeline service.⁹ The Commission dismissed industry concerns that shortening the non-usage window to 30 days would result in increased de-enrollments of Lifeline eligible subscribers who expressed no desire to be de-enrolled, reasoning that such concerns were based on situations where the Commission did not accept outbound text messages as usage.¹⁰

TracFone, both in its Petition for Reconsideration¹¹ and Motion for Stay,¹² underscored that the consumer harm most likely to result from the shortened non-usage period is the de-enrollment of a significant number of eligible Lifeline subscribers who have expressed no intention of not wanting or needing their Lifeline service and who will often re-enroll.¹³ In its

to perform all the functions described in Section 0.91 of the Commission's rules, including specifically the authority to act on requests for waiver of the rules).

⁸ See 2016 Lifeline Modernization Order ¶ 414.

⁹ See *id.* ¶ 415.

¹⁰ See *id.*

¹¹ See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., TracFone Petition for Reconsideration (filed June 23, 2016) (TracFone Petition for Reconsideration).

¹² See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Motion for Stay or, in the Alternative, Deferral of the Effective Date of Revised 47 C.F.R. § 54.407(c)(2) (filed Sept. 8, 2016) (TracFone Motion for Stay).

¹³ See TracFone Petition for Reconsideration at 23-25; see also TracFone Motion for Stay at 2, 4-5.

reconsideration petition, TracFone argued that the Commission should retain the current 60-day window because the Commission's rationale for trading an expanded definition of non-usage for a shortened non-usage window did not address situations where a consumer may not be able to use his or her Lifeline service and as such, would likely be de-enrolled for non-usage for situations out of the subscriber's control.¹⁴ In the TracFone Motion, TracFone argued that the Commission should stay the effective date for the revised section 54.407(c)(2) or alternatively defer the effective date to prevent hardship to households which face de-enrollment and loss of Lifeline service through no fault of their own and avoid burdening Lifeline providers.¹⁵

Non-willful and unwanted de-enrollment from the Lifeline program not only imposes significant burdens on consumers, it also subjects consumers to unnecessary endangerment resulting from the termination without their express consent of essential communications services to which they are entitled. Forced de-enrollment based on the shortened non-usage and cure periods also imposes substantial burdens on providers and Lifeline program administration. TracFone's request for the Commission to reconsider its shortening of the non-usage period and cure period based on likely consumer harms not considered by the Commission when it adopted the rule change has merit and should be resolved *before* consumers are harmed or endangered by implementation of the shortened time periods. If the Commission is prepared to accept these harms and the associated endangerment of unsuspecting consumers who already are among the most vulnerable in our population, it should do so transparently and with a rational explanation.

Second, ETCs are now grappling with unwarranted uncertainty and confusion created by guidance released by the Universal Service Administrative Company (USAC) on October 5,

¹⁴ See TracFone Petition for Reconsideration at 23-25.

¹⁵ See TracFone Motion for Stay at 2-5.

2016¹⁶ that effectively would have ETCs implement the new non-usage rule before its lawful effective date of December 2, 2016. The USAC Guidance fails to explain how the old non-usage rule is to be sunset prior to the effective date of the rule which the Commission voted to replace it with. This is likely because no rational explanation is available. The Commission had one rule and chose to replace it with another. It did not adopt a transition period (as it did for several of its other reforms), and without one, none exists. As adopted, the old rule no longer applies and the new one does as of December 2. And so, old-rule non-usage and cure periods not completed by December 2 get replaced by new-rule non-usage periods that begin on December 2 – not earlier. Lawful application of the Commission’s rules – old and new – requires a fresh start as of December 2, 2016.

The alternative is not only unlawful, it is impractical and threatens to create substantial consumer confusion and harm. Without clarification from the Bureau, many ETCs will decline USAC’s guidance in favor of complying with the rule; while others may be tempted to follow USAC’s guidance mistakenly thinking that it is the rule. When the Lifeline program administrator provides guidance that is inconsistent with the rules, as adopted by the Commission, the Bureau must promptly take corrective action.

Third, confusion looms with respect to conflicts between and arising from application of revised rules 47 C.F.R. §§ 54.405(e)(3), 54.407(a) and 54.407(c)(2). The Commission’s regulations require that subscribers are to remain enrolled in Lifeline until expiration of the non-usage cure period.¹⁷ The rules also (as they must) allow ETCs to claim reimbursement for

¹⁶ See “Update to the Non-Usage Rules,” LI Program News, 3rd Quarter 2016, USAC (Oct. 5, 2016), <http://www.usac.org/li/about/outreach/newsletters/2016/Q3.aspx> (last visited Oct. 24, 2016) (USAC Guidance).

¹⁷ See 2016 Lifeline Modernization Order ¶ 415; 47 C.F.R. §§ 54.405(e)(3).

subscribers enrolled in Lifeline on the first of the month.¹⁸ However, the rules also state that reimbursement cannot be sought for subscribers who are enrolled in Lifeline and have not used Lifeline service in 30 days or who have not cured non-usage with the 15-day cure period.¹⁹ This last rule squarely conflicts with the former ones, as well as the Commission’s obligation to provide sufficient funding for subscribers enrolled in Lifeline.²⁰ The Commission cannot order a cure period in which enrollment is maintained and service is made available to subscribers and then refuse to reimburse ETCs for the service they are required to make available to consumers. One rule has it right and the other does not. The Bureau should act promptly to waive application of the conflicting rule that would deny reimbursement for service provided to subscribers lawfully (and mandatorily) enrolled in Lifeline.

In light of the threat of consumer harm and endangerment, USAC guidance that is both contrary to law and impractical, and a direct conflict in the Commission’s rules, Petitioners respectfully request that the Bureau grant a time-limited waiver of rules 54.405(e)(3) and 54.407(c)(2) until such time that the Commission rules on the TracFone Petition for Reconsideration and corrects the USAC Guidance and the conflict in its rules.

Specifically, pursuant to sections 0.91(b) and 0.291(a) of the Commission’s rules,²¹ the Petitioners request that the Bureau: (1) waive sections 54.405(e)(3) and 54.407(c)(2), which

¹⁸ 47 C.F.R. § 54.407(a).

¹⁹ 47 C.F.R. § 54.407(c)(2).

²⁰ See 47 U.S.C. § 214(e)(1)(A) (stating that ETCs shall offer services “that *are supported* by Federal universal service support... (emphasis added)”; 47 U.S.C. § 254(b)(5) (stating, “there should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service”); 47 U.S.C. § 254(e) (stating “any such [Federal Universal Service] support should be explicit and sufficient to achieve the purposes of this section [Universal Service Support].” .

²¹ See 47 C.F.R. § 0.91(b); *see also* 47 C.F.R § 0.291(a).

shorten the 60-day non-usage period to just 30 days; (2) direct USAC to rescind its guidance that would implement the 30-day non-usage rule prior to the December 2, 2016 effective date; and (3) waive section 54.407(c)(2) which limits Lifeline eligibility and reimbursement to only those consumers who cure non-usage during the cure period and which squarely conflicts with section 54.407(a)'s directive that ETCs are entitled to reimbursement for subscribers enrolled in Lifeline and served directly as of the first day of the month.

I. BACKGROUND

Before setting forth specific requests for waivers and related Bureau action, this section sets forth foundational information regarding the revised rules 54.405(e)(3), 54.407(c)(2) and 54.407(a), as well as the USAC Guidance.

A. 47 C.F.R. § 54.405(e)(3)

In its landmark 2012 Lifeline Reform Order, the Commission imposed on Lifeline subscribers who select prepaid wireless services, and the ETCs who serve them, a usage requirement that triggers de-enrollment and service termination after a 60-day non-usage period and a 30-day cure period.²² Since then, ETCs have developed systems and processes necessary to implement this rule and have made significant efforts to educate subscribers about the process when a subscriber does not use their Lifeline service for 60 days. Most subscribers have come to know and understand the time frames in this rule.

Four years later, in its 2016 Lifeline Modernization Order, the Commission decreased the non-usage period from 60 days to 30 days and the cure period from 30 days to 15 days,

²² See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, ¶¶ 255-263 (rel. Feb. 6, 2012) (2012 Lifeline Reform Order).

providing a total of 45 days for subscribers of prepaid wireless service²³ to use their Lifeline service.²⁴ Rule 54.405(e)(3) has been revised to state:

De-enrollment for non-usage. Notwithstanding paragraph (e)(1) of this section, if a Lifeline subscriber fails to use, as “usage” is defined in §54.407(c)(2), for 30 consecutive days a Lifeline service that does not require the eligible telecommunications carrier to assess and collect a monthly fee from its subscribers, an eligible telecommunications carrier must provide the subscriber 15 days' notice, using clear, easily understood language, that the subscriber's failure to use the Lifeline service within the 15-day notice period will result in service termination for non-usage under this paragraph. Eligible telecommunications carriers shall report to the Commission annually the number of subscribers de-enrolled for non-usage under this paragraph. This de-enrollment information must be reported by month and must be submitted to the Commission at the time an eligible telecommunications carrier submits its annual certification report pursuant to §54.416.²⁵

The 2016 Lifeline Modernization Order further provides that de-enrollment cannot occur prior to the conclusion of the cure period: “Lifeline service providers must notify subscribers of possible termination on the 30th day and terminate service if, during the subsequent 15 days, the subscriber has not used the service.”²⁶

B. 47 C.F.R. § 54.407(c)(2)

Rule 54.407(c)(2), referenced in rule 54.405(e)(3), provides for reimbursement to ETCs based on a subscriber’s usage during the non-usage or cure period:

After service activation, an eligible telecommunications carrier shall only continue to receive universal service support

²³ The Commission has never required subscribers of wireline Lifeline services to use their service. Similarly, consumers need not call 911 every 30 days to ensure that they maintain that service. The Commission’s dignity-diminishing, overly-prescriptive usage requirement and limited definition of what constitutes usage applies only to Lifeline subscribers who choose the most affordable prepaid wireless service options.

²⁴ See 2016 Lifeline Modernization Order ¶ 415.

²⁵ 47 C.F.R. § 54.405(e)(3).

²⁶ See 2016 Lifeline Modernization Order ¶ 415.

reimbursement for such Lifeline service provided to subscribers who have *used the service* (emphasis added) within the last 30 days, or who have *cured their non-usage* (emphasis added) as provided for in § 54.405(e)(3).²⁷

The rule provides that the ETC can only receive reimbursement for subscribers who have used the service during the non-usage period or cured their non-usage during the cure period.

C. 47 C.F.R. § 54.407(a)

Rule 54.407(a) provides that the first of the month is the “snapshot” date when ETCs take a “snapshot” of the number of subscribers they serve directly on the first of the month for claiming disbursements for subscribers for the previous month.²⁸ Under the snapshot rule:

Universal service support for providing Lifeline shall be provided directly to an eligible telecommunications carrier *based on the number of actual qualifying low-income customers it serves directly as of the first day of the month* (emphasis added).²⁹

In the 2015 Lifeline Reform Order, the Commission established the first of each month as a uniform date for the snapshot to promote efficiency and ease of administration.³⁰ The 2016 Lifeline Modernization Order added to the rule that the reimbursements eventually will be provided based on the customers found in the National Verifier:

After the National Verifier is deployed in a state, reimbursement shall be provided to an eligible telecommunications carrier based on the *number of actual qualifying low-income customers it serves directly as of the first day of the month found in the National Verifier* (emphasis added).³¹

²⁷ 47 C.F.R. § 54.407(c)(2).

²⁸ See 47 C.F.R. § 54.407(a).

²⁹ *Id.*

³⁰ See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, ¶ 242 (rel. June 22, 2015) (Lifeline Reform Order).

³¹ 47 C.F.R. § 54.407(a).

The basis set forth in this rule for reimbursing ETCs for subscribers they serve who are enrolled in Lifeline as of the first of the month is undermined by the language in rule 54.407(c)(2), which provides that only subscribers who cure non-usage during the 15-day cure period are eligible for reimbursement. Subscribers served by ETCs and enrolled in Lifeline as of the first day of the month, but who are in the midst of a 15-day cure period as of that date (cure status still to be determined), are eligible for Lifeline benefits and corresponding reimbursement under rule 54.407(a). Rule 54.407(c)(2)'s illogical directive that these subscribers who are served and enrolled – and not yet eligible to be de-enrolled or to have service terminated – are not eligible for reimbursement is squarely in conflict with rule 54.407(a).

D. USAC Guidance

In the October 5, 2016 version of its bi-weekly Lifeline newsletter, USAC provided guidance to ETCs on how to implement the updates to the non-usage rules:

The 30 day non-usage period will apply to all subscribers, *even if their non-usage period begins before December 2* (emphasis added). On December 2, subscribers who are currently in a non-usage period of 30 or more days must be notified that they risk de-enrollment if they do not use their benefit in the next 15 days.³²

The USAC Guidance would have ETCs implement the new non-usage rule *before* its lawful effective date of December 2, 2016, providing no explanation as to how to sunset the old non-usage rule's 60-day non-usage and 30-day cure periods prior to the date on which the non-usage and cure periods in the revised rule become effective. No legal authority exists to support implementing the revised rules' time periods before they are legally effective – or to sunset the current rules' time periods before the new rule replaces them. Furthermore, implementation of

³² USAC Guidance.

these conflicting demands is impractical and will lead to unnecessary consumer harm and confusion while exposing ETCs to unwarranted regulatory costs and audit/enforcement risks.

II. REQUEST FOR WAIVER

Given the threat of consumer harm and endangerment, unlawful and impractical USAC Guidance, and a direct conflict in the Commission's rules, Petitioners respectfully request that the Bureau grant a time-limited waiver of rules 54.405(e)(3) and 54.407(c)(2) until the Commission rules on the pending TracFone Petition for Reconsideration and corrects the USAC Guidance and conflict in the Commission's rules. Petitioners request that the Bureau, pursuant to its delegated authority:³³ (1) waive rules 54.405(e)(3) and 54.407(c)(2), which shorten the 60-day non-usage period to just 30 days; (2) direct USAC to rescind its guidance that would implement the 30-day non-usage rule prior to the December 2, 2016 effective date; and (3) waive rule 54.407(c)(2) which limits Lifeline eligibility and reimbursement to only those consumers who cure non-usage during the cure period and which squarely conflicts with rule 54.407(a)'s directive that ETCs are entitled to reimbursement for subscribers enrolled in Lifeline and served directly as of the first day of the month.

A. The Bureau Should Waive Sections 54.405(e)(3) and 54.407(c)(2) because the Revised 30-Day Non-Usage Rules Will Harm and Endanger Consumers

Implementing the 30-day non-usage rules on December 2 will boost the number of subscribers who will be unfairly de-enrolled despite remaining eligible for Lifeline support and having expressed no desire to discontinue Lifeline-supported communications services. This unwilling and typically unwanted denial of Lifeline benefits results in the termination of critical communications services that not only harms consumers in terms of the burdens imposed by re-

³³ See 47 C.F.R. § 0.91(b); *see also* 47 C.F.R. § 0.291(a).

enrollment, it affirmatively endangers them and their children by leaving them without a means to communicate with emergency services, family and educators. TracFone petitioned the Commission to reinstate the 60-day non-usage rule, arguing that the Commission provided no support for reducing the inactivity period to 30 days other than to say it expanded the definition of usage to include sending text messages and using broadband service.³⁴ Not a single party opposed the TracFone Petition for Reconsideration or even so much as offered a defense of the Commission's rule change.

In its petition for reconsideration, TracFone explains that its subscribers' non-usage during a 30-day period occurs for a variety of legitimate reasons including travel and illness.³⁵ Sprint also identified primary causes of inactivity as a lost or misplaced handset, a subscriber in the hospital, or a broken handset.³⁶ A filing by the Alliance for Retired Americans also noted that many users "may temporarily stop usage because they are in respite care, recuperating in a hospital, or have moved in with other family members temporarily for health or other personal reasons."³⁷ Petitioners agree that none of these reasons illustrate disinterest in or a lack of need for the Lifeline service to which these consumers are entitled.³⁸

³⁴ See TracFone Petition for Reconsideration at 23-25.

³⁵ See *id.* at 24.

³⁶ See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Comments of Sprint Corporation at 6 (filed July 29, 2016) (Sprint Comments).

³⁷ Letter from Richard J. Fiesta, Executive Director of the Alliance for Retired Americans, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42, et al. at 1 (filed Oct. 3, 2016).

³⁸ See Letter from John Heitmann and Joshua Guyan, Counsel to Joint Lifeline ETC Petitioners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42, et al. at 2 (filed Sept. 15, 2016) (Joint Lifeline Petitioners Ex Parte); see also *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Joint Lifeline ETC Petitioners' Reply In Support of their Petition for Reconsideration at 9 (filed Aug. 8, 2016) (Joint Lifeline Petitioners Reply Comments).

As a result, an increased number of de-enrolled subscribers will re-apply for Lifeline service after being de-enrolled (often closely thereafter), burdening both low-income consumers who must repeat the Lifeline application process, and Lifeline providers, who must process new applications for the de-enrolled but still eligible customers who received service the previous month.³⁹ The statistics in the record already are staggering. TracFone states that roughly 25 percent of its Lifeline subscribers who are de-enrolled under the non-usage rule end up re-applying for Lifeline service the following month with an average of 70 percent of those subscribers seeking to re-enroll during the first 15 days of the following month.⁴⁰ Sprint filed similar data, stating that for those subscribers with no activity during a 30-day window, 38 percent resume their usage within the next 15 days, while 66 percent resume usage within the next 60 days.⁴¹ The Joint Lifeline ETC Petitioners also expressed support for TracFone and Sprint's positions, providing the results of an analysis one of the Joint ETC Petitioners conducted, where about *three times* the number of individuals would be de-enrolled under the new 30-day non-usage period compared to the 60-day non-usage period.⁴²

Because of the immediate harm the revised rule will cause, TracFone filed a motion for the Commission to stay the effective date for the revision to rule 54.407(c)(2), alternatively requesting that the Commission voluntarily defer the effective date until it has an opportunity to address the legal and public interest issues raised.⁴³ TracFone stressed that “millions of Lifeline-eligible low-income households will lose service at least temporarily” if the rule takes effect as

³⁹ See TracFone Petition for Reconsideration at 24.

⁴⁰ See *id.*

⁴¹ See Sprint Comments at 6.

⁴² See Joint Lifeline Petitioners Ex Parte at 2.

⁴³ See TracFone Motion for Stay at 9.

planned.⁴⁴ Sprint warned that the shorter non-usage period would leave many mobile Lifeline customers “without critical voice or data service.”⁴⁵

The Joint Lifeline ETC Petitioners provided evidence for the record in support of TracFone’s motion, confirming that the churn from constant de-enrollments and re-enrollments due to intermittent periods of non-usage “imposes a substantial cost on ETCs that often must provide a new device because the subscriber may have discarded the old one when he or she was de-enrolled.”⁴⁶ Sprint also echoed that churn would “driv[e] up program and service provider costs,”⁴⁷ including “additional investment in customer education.”⁴⁸

The record developed since adoption of the shortened non-usage and cure periods shows that the 30-day non-usage rule will harm – and endanger – low-income consumers through increased de-enrollments and thereby burden ETCs and the Lifeline program administrator who will incur increased programmatic costs to re-enroll customers and educate customers on the new rules. Therefore, Petitioners request that the Bureau waive rules 54.405(e)(3) and 54.407(c)(2) in light of the fact that the Commission has not yet ruled on either the TracFone Petition for Reconsideration or Motion, and the December 2 effective date is fast approaching. While the rationale supporting the requests for relief largely is the same, Petitioners request that the Bureau, pursuant to delegated authority, grant a time-limited waiver of rules 54.405(e)(3) and 54.407(c)(2) to allow time for the Commission to rule on the TracFone Petition for

⁴⁴ *Id.*

⁴⁵ *See* Sprint Comments at 6-7.

⁴⁶ *See* Joint Lifeline Petitioners Ex Parte at 2.

⁴⁷ *See* Sprint Comments at 6.

⁴⁸ *See id.* at 7.

Reconsideration.⁴⁹ If the Commission is prepared to accept the harms and the associated endangerment of unsuspecting consumers who already are among the most vulnerable in our population by allowing the shortened non-usage rule time periods to go into effect, it should do so transparently and with a rational explanation.

B. The Bureau Should Correct the USAC Guidance and Make Clear that Consumers Get a Fresh Start with 30 Days to Demonstrate Usage as of December 2

Petitioners respectfully request that the Bureau direct USAC to rescind its guidance that would implement the 30-day non-usage rule prior to the December 2, 2016 effective date. Notably, the USAC Guidance provides no explanation as to how the 60-day non-usage rule is to be sunset before the legal effective date of the rule the Commission voted to replace it with. This is likely because no legal justification exists. The Commission opted to replace its 60-day non-usage rule with a 30-day non-usage period and its 30-day cure period with a 15-day cure period without adopting a period for ETCs and consumers to transition from the old rule to the new rule, which it has done for other reforms. As such, no such transition is available to USAC, ETCs or their Lifeline subscribers.

As adopted, the old rule no longer applies and the new one takes effect on December 2. Plain application of the law dictates that the old-rule non-usage and cure periods not completed by December 2 are replaced by new-rule non-usage periods that begin on December 2 – not earlier. Lawful application of both the old and new rules requires that the slate be wiped clean and subscribers' non-usage periods be reset on December 2, 2016. The alternative is not only unlawful, but also impractical, threatening to create substantial consumer confusion and harm.

⁴⁹ Petitioners do not request a specific time limit for the waiver. Rather, Petitioners request that the waiver remain in place until the Commission acts upon the TracFone Petition for Reconsideration.

Without the Bureau's clarification, many ETCs will decline USAC's guidance and opt to comply with the rule; while others may be falsely tempted to adhere to the USAC Guidance thinking that it is the rule. When the Lifeline program administrator publishes guidance inconsistent with the rules, as adopted by the Commission, the Bureau must responsibly and promptly take corrective action.

1. The USAC Guidance Erroneously Suggests Implementation of the New Non-Usage Rules Prior to their Lawful Effective Date

Unless this petition or other pending requests for relief are granted, the revised non-usage rules take effect on December 2, 2016. According to the Ordering Clause in the Lifeline Modernization Order, sections 54.407(a) and 54.407(c)(2) were subject to the Paperwork Reduction Act and become effective on December 1, 2016 or 60 days after announcement in the Federal Register of Office of Management and Budget (OMB) approval of the subject information collection requirements, whichever is later.⁵⁰ As a result of the Federal Register publication of OMB approval on October 3, 2016, the non-usage rules becomes effective on December 2, 2016.⁵¹

However, the USAC Guidance directly contradicts the December 2 effective date, stating that the "30 day non-usage period will apply to all subscribers, even if their non-usage period begins *before* December 2. On December 2, subscribers who are currently in a non-usage period of 30 or more days must be notified that they risk de-enrollment if they do not use their benefit in the next 15 days."⁵² This guidance erroneously suggests that the 30-day non-usage period

⁵⁰ See 2016 Lifeline Modernization Order ¶445.

⁵¹ See *Wireline Competition Bureau Announces Effective Dates Following Approval by the Office of Management and Budget of Lifeline Rules in the Lifeline Modernization Order*, WC Docket Nos. 11-42, 09-197, Public Notice, DA 16-1133 (rel. Oct. 3, 2016).

⁵² See USAC Guidance (emphasis added).

applies at the same time the 60-day non-usage period applies, which is before December 2, 2016. The law is clear in this instance: the two different sets of time periods do not and cannot apply at the same time.

While the Commission could have prescribed a transition period, as it did for other rule changes adopted in the 2016 Lifeline Modernization Order, it did not. USAC does not have the authority to second-guess or to effectively change the Commission's decision by creating a transition period where both new and old rule provisions apply.⁵³ It is clear that USAC cannot "make policy."⁵⁴ Notably, this is not a case of unclear rules for which USAC should seek guidance from the Commission on how to implement the rule changes. Rather, the circumstances here are crystal clear: the 60-day non-usage period and 30-day cure period cease to exist as of December 2 and the new 30-day non-usage period and 15-day cure period apply as of that date, unless this waiver request or one of TracFone's requests for legal relief is granted.

2. ETCs Cannot Practically Implement the New Non-Usage Rule Prior to the Effective Date

Besides being unlawful, USAC's interpretation poses extraordinary practical challenges for ETCs and risks enormous confusion for Lifeline subscribers. Under the current rules, ETCs inform consumers upon enrollment that they must use their service at least once every 60 days. If a subscriber does not use the service within 60 days, the ETC must inform the subscriber that he or she has 30 days to cure the non-usage. These current rule requirements are reflected in forms and other consumer-facing collateral, as well as in some ETC designation orders and in

⁵³ The Bureau also lacks such authority. While Commission rules permit the Bureau to correct conflicts between rules and Orders, the Commission expressly prohibits any such changes from creating new or different policy other than that articulated by the Commission. *See* 2016 Lifeline Modernization Order ¶ 433.

⁵⁴ *See* 47 C.F.R. § 54.702(c).

ETC-specific terms and conditions applicable to Lifeline service. Each takes time to change and accelerating that time frame at this late date is impractical, if not impossible.

As set forth above, the non-usage rule change adopted in the 2016 Lifeline Modernization Order legally requires a simultaneous end and beginning. The only practical way to accomplish this is to advise subscribers of the rule changes effective on December 2, including the new 30-day non-usage period and 15-day cure period. With respect to non-usage, 60-day non-usage and 30-day cure periods not completed by December 2 will be replaced by a fresh 30-day non-usage period, as required by the rule, and a new 15-day cure period, if required.

The USAC Guidance suggests a different approach that is impractical for ETCs to implement and unfair for subscribers to endure. Under the USAC Guidance, 30-day cure periods are to somehow give way to shortened cure periods, at some point prior to December 2. USAC offers no guidance on how to explain to a subscriber who received a 30-day cure notice on, for example, November 30, that, as of December 2, he or she will have far fewer days to cure non-usage. In a sincerely appreciated effort to resolve ETC concerns, USAC management has informally suggested that November 17, 2016 could be the cut-off date to move to new notices specifying December 17 as the end of the cure period. However, aside from unlawfully denying subscribers the then legally specified cure period, it is simply not practical for ETCs to customize subscriber notices on a daily basis – or to square them with other notices that ETCs will be sending in advance of the December 2 rule changes. With many of the 2016 Lifeline Modernization Order rule changes taking effect on December 2, neither the time nor resources are available to figure out how to implement the USAC Guidance – especially when a logical

and transition-free flash-cut to a fresh 30-day non-usage period on December 2 comports squarely with and is required by the Commission's rules.⁵⁵

Notably, the USAC Guidance also is at odds with the rationale (the adequacy of which has been fairly challenged in the TracFone Petition for Reconsideration) for shortening the non-usage and cure periods. The Commission explained that it shortened the non-usage period because of its expanded definition of usage, which as of December 2 will include the sending of outbound text messages and data usage, giving customers more ways to meet the usage requirement.⁵⁶ Therefore, it would be unfair to impose on consumers a 30-day non-usage period prior to the December 2 date upon which outbound text messages and data count as usage. If the Commission seeks to lessen the harm and endangerment its new 30-day non-usage rule will cause to consumers, it must not implement the new rule before it implements the change in its definition of usage.

Another complicating factor is state requirements that have not yet been modified to comport with the new 30-day non-usage and 15-day cure periods. Some states, such as California, require 30 days' notice of changes to ETCs' terms and conditions. It simply is not possible to translate the USAC Guidance into revised terms and conditions at this late date.

C. The Bureau Should Waive Section 54.407(c)(2) which Conflicts with the Reimbursement Directive in Section 54.407(a)

Conflicts between and stemming from application of revised rules 47 C.F.R. §§ 54.405(e)(3), 54.407(a) and 54.407(c)(2) have placed ETCs in an untenable position. The

⁵⁵ It will be inherently less confusing and definitely less harmful for consumers to learn of a fresh 30-day non-usage period that absolves prior non-usage cure notices, than it will be for them to understand that the prior notices gave cure time frames that are being shortened for no lawful or other good reason.

⁵⁶ See 2016 Lifeline Modernization Order ¶¶ 414-415; 47 C.F.R. § 54.407(c)(2).

Commission’s regulations require that subscribers are to remain enrolled in Lifeline until expiration of the non-usage cure period.⁵⁷ Section 54.407(a) of the Commission’s rules also (as it must) allows ETCs to claim reimbursement for subscribers served by them and enrolled in Lifeline on the first of the month.⁵⁸ This right to reimbursement clearly includes subscribers subject to a 15-day non-usage cure period (cure status to be determined) because they are served by an ETC and enrolled in Lifeline for the duration of the cure period.⁵⁹ Conversely, section 54.407(c)(2) of the Commission’s rules provides that ETCs cannot seek reimbursement for subscribers who are in enrolled but have not used Lifeline service during the 15-day cure period.⁶⁰ Thus, there is a direct conflict between rule 54.407(a) and rule 54.407(c)(2).

The Commission cannot require a cure period in which enrollment in Lifeline is maintained and Lifeline service is made available to subscribers, and then refuse to reimburse ETCs for the service the ETCs are required to make available to consumers during that time period and the period leading up to it (depending on when the first day of the month falls relative to the subscriber’s usage profile).⁶¹ The result mandated by rule 54.407(c)(2) not only contravenes the legal principle requiring reimbursements for the discounts on service provided to Lifeline subscribers, it is unfair to ETCs who incur costs and audit/enforcement risks regardless of whether subscribers demonstrate “usage” of their Lifeline service, as prescribed in the FCC’s

⁵⁷ See 2016 Lifeline Modernization Order ¶ 415; 47 C.F.R. § 54.405(e)(3).

⁵⁸ See 47 C.F.R. § 54.407(a).

⁵⁹ In addition, the reimbursement on the snapshot date reimbursement for service provided in the previous month. Whether a subscriber is on the first or last day of the cure period, they received Lifeline service for the preceding month.

⁶⁰ 47 C.F.R. § 54.407(c)(2).

⁶¹ See *supra* n. 20.

rules.⁶² Accordingly, the Bureau should act promptly to waive application of rule 54.407(c)(2) which would deny reimbursement for service provided to subscribers lawfully (and mandatorily) enrolled in Lifeline.

III. GOOD CAUSE EXISTS TO GRANT THE REQUESTED WAIVER

The Commission may waive any of its rules for good cause shown,⁶³ and on delegated authority, the Bureau may waive the Commission's rules based on the same standard.⁶⁴ Discretion to waive a rule may be exercised where the "particular facts make strict compliance inconsistent with the public interest."⁶⁵ Hardship, equity or more effective implementation of overall policy may also be considered.⁶⁶ In short, grant of a waiver request is justified when the public interest would be served by such action.

Here, granting the requested waivers would serve the public interest, given that such waivers would serve to avoid or mitigate (1) the significant harm and endangerment to consumers that would be caused by allowing the shortened non-usage and cure time periods to go into effect prior to the Commission's having had the opportunity to rule on the TracFone Petition for Reconsideration and to carefully and transparently consider evidence of consumer harm and endangerment, (2) the harms to consumers and ETCs arising from the impractical and

⁶² Costs include monthly line fees to underlying network providers, support and compliance vendors and the like. Regulatory audit and enforcement risk attaches to each Lifeline subscriber enrolled in the National Lifeline Accountability Database (NLAD) and/or the National Verifier. Absent an affirmative request from a subscriber to de-enroll from Lifeline service during a 15-day cure period, subscribers remain enrolled in Lifeline and in NLAD and service is not terminated or disconnected prior to the end of the cure period.

⁶³ See 47 C.F.R. § 1.3.

⁶⁴ See 47 C.F.R. § 0.91(b); see also 47 C.F.R. § 0.291(a).

⁶⁵ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular).

⁶⁶ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

unlawful USAC Guidance that provides for implementation of the new shortened non-usage period before its legal effective date (in conflict with the old-rule that remains effective during that time), and (3) the harms, risks, confusion and potential inequity resulting from the direct conflict in the Commission's rules regarding reimbursement for discounted Lifeline service provided to subscribers enrolled in Lifeline during the non-usage cure period.

The best outcome for consumers, ETCs, the Lifeline program administrator, and the Lifeline program itself is for the Bureau to waive rules 54.405(e)(3) and 54.407(c)(2) while also directing USAC to rescind its erroneous guidance. Given the December 2, 2016 effective date of the changes to these rules, this waiver requires immediate action to protect consumers from harm and endangerment and to protect ETCs, the program administrator and the program itself from burdens, harms and risks associated with inconsistent implementation of and compliance with conflicting Commission rules and USAC Guidance that conflicts with those rules.

Absent a waiver of the rules 54.405(e)(3) and 54.407(c)(2), many eligible low-income consumers face the significant likelihood that they will through no action of their own be denied Lifeline benefits to which they are entitled and for which they have expressed no desire to discontinue. As described above, the record illustrates just how many Lifeline subscribers may lose access to vital communications services when the new 30-day non-usage rule takes effect.⁶⁷ While most of these subscribers are expected to re-enroll in Lifeline, the harm and endangerment that results from having essential communications services cut-off in the interim should not be ignored or discounted. Family, healthcare providers and schools will no longer be reachable until the consumer goes through the burdensome task of re-enrolling in Lifeline, which requires a fresh eligibility determination and a fresh set of subscriber self-certifications. The public interest

⁶⁷ See *supra* at 10-13.

clearly would be served through grant of this waiver request, as it would allow the Commission the time it needs to reconsider its shortened non-usage rule in a manner that makes transparent its willingness (or not) to expose some of the nation's most vulnerable consumers to burdens and endangerment in exchange for an unproven and dubious attempt at bolstering fiscal integrity, while also considering whether the impact of its shortened non-usage rule results in the equitable and efficient administration of the Lifeline program.

Without the requested waivers, consumer face additional harms that may result from confusing and conflicting non-usage notices and prematurely shortened cure periods that would result from acceptance and implementation of the USAC Guidance. ETCs, too, face significant confusion, uncertainty and risk. While ETCs generally can be expected to follow USAC Guidance, some may be surprised to learn that doing so does not absolve them of liability or risk when that guidance conflicts with the law (which in this case it does). The USAC Guidance would have the 30-day non-usage rule apply before its lawful effective date and at the same time as the current 60-day non-usage rule. As explained above, this is not only unlawful, it is impractical.⁶⁸ While all Lifeline subscribers are legally entitled to a fresh 30-day non-usage period as of December 2, 2016, the USAC Guidance (unless corrected) virtually assures that some will not get it. The result will be more consumer confusion and harm, with ETCs left holding bags full of consumer complaints, regulatory costs, and audit/enforcement exposure. Here, too, the public interest would be served by grant of this petition which requests rescission or correction of the USAC Guidance.

Finally, the public interest is clearly served by allowing the Commission time to resolve a conflict in its rules. As explained above, Section 54.407(a) establishes that reimbursement will

⁶⁸ See *supra* at 13-18.

be due for Lifeline service provided to subscribers enrolled in Lifeline on the first day of the month, while Section 54.407(c)(2) bars reimbursement for Lifeline service provided to subscribers enrolled in Lifeline who are in a non-usage cure period.⁶⁹ This conflict places ETCs in an untenable position. Rules that do not provide for equitable and efficient program administration result in harm not only to ETCs but to consumers and to the program itself.

The Bureau previously has acted in circumstances such as these where grant of a waiver was shown to be in the public interest. In 2012, the Bureau granted similar waiver requests to ensure that consumers continued to receive benefits when it reformed its Lifeline rules in 2012.⁷⁰ The waivers granted were adopted as interim measures to allow states to modify their procedures under the 2012 Lifeline Reform Order.⁷¹ The Commission had determined that a “temporary, narrowly tailored waiver from a portion of those rules is appropriate in this case to ensure that all eligible consumers are able to continue to receive benefits while ETCs remain compliant with our rules.”⁷² Similarly, good cause exists here and the public interest would be served by grant of the temporary waivers and other relief requested. The rules at issue apply to only a subset of Lifeline subscribers and grant of the requested waivers until such time that the Commission rules on the TracFone Petition for Reconsideration, and corrects the USAC Guidance and the conflict in its rules would allow time necessary for the Commission to reconsider its new non-usage rule and to resolve conflicts in the rules and the USAC Guidance so as to mitigate burdens and harms to consumers, ETCs, the program administrator and the program itself.

⁶⁹ See *supra* at 18-19.

⁷⁰ See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Waiver Order, DA 12-863 (2012).

⁷¹ See *id.* ¶¶ 5, 10, 13.

⁷² *Id.* ¶ 5.

IV. CONCLUSION

For the foregoing reasons, the Bureau should grant this Petition for a waiver of rules 54.405(e)(3) and 54.407(c)(2) until such time that the Commission rules on the TracFone Petition for Reconsideration, and corrects the USAC Guidance and the conflict in its Lifeline reimbursement rules. Specifically, the Bureau should: (1) waive rules 54.405(e)(3) and 54.407(c)(2), which replaces the 60-day non-usage period with 30 days; (2) waive rule 54.407(c)(2), which requires usage within the non-usage cure period and conflicts with the reimbursement directive set forth in rule 54.407(a); and (3) direct USAC to rescind its guidance that would have the 30-day non-usage rule implemented prior to the December 2, 2016 effective date of the revised rule.

Respectfully submitted,

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